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Ontario Notaries Public and Commissioners: Powers and Territorial Restrictions

*Mark Gannage**

Ontario lawyers are occasionally asked about the powers and territorial restrictions of Ontario notaries public and commissioners. Further, Ontario lawyers are required to ascertain their *own* related powers and territorial restrictions while abroad. This question has become more pertinent as the practice of law continues its globalization trend. Ontario lawyers are becoming increasingly engaged in international practice. More than ever, they are involved in litigation, dispute resolution, and transactions having a transnational nature, as well as working in foreign legal offices.¹

Sources addressing these issues seem scarce.² They do not appear to have been the subject of much litigation or commentary.³ The provincial statutory regimes of the Notaries Act,⁴ the Commissioners for taking Affidavits Act,⁵ and the Evidence Act,⁶ offer some guidance.

Some common questions and their short answers are provided below.

* Lawyer, Toronto, Ontario. My gratitude extends to Susan C. Zimmerman of Goodman Phillips & Vineberg for our discussions about this subject. A version of this article is to be published in *The Canadian Law Newsletter*, Spring Edition 2000, Vol. XXXV, No. 1.

1. This development in North America is recognized in a June 1998 agreement, reached after four years of negotiations, among the professional bodies representing lawyers and notaries from Canada, the United States, and Mexico. Under this agreement, lawyers and notaries from these three NAFTA countries would be allowed to set up foreign offices and deliver legal services as "foreign legal consultants" within these countries. They would also be allowed to associate with lawyers and notaries who practice domestic law in each jurisdiction. See *National*, Vol. 8, No. 1 (Ottawa: Canadian Bar Association, January/February 1999) 40. This agreement has not been ratified by any of the governments in the three involved jurisdictions.
 2. The related issue of the procedures for authenticating notarized documents is thoroughly canvassed in JOHN P. SINNOTT, *A PRACTICAL GUIDE TO DOCUMENT AUTHENTICATION: LEGALIZATION OF NOTARIZED & CERTIFIED DOCUMENTS*. This book consists of two chapters and four appendices. Chapter 1 covers consular legalization in countries other than the United States (Canada is addressed at pp. 67-69); Chapter 2 covers legalization within the states and territories of the United States.
 3. For a general discussion of the admissibility of documentary evidence in Canadian court proceedings, see, e.g., JOHN SOPINKA ET AL., *THE LAW OF EVIDENCE IN CANADA* (2d ed. 1999) (Chapter 18: Documentary Evidence).
 4. Notaries Act, R.S.O., ch. N.6 (1990).
 5. Commissioners for taking Affidavits Act, R.S.O., ch. C.17 (1990).
 6. Evidence Act, R.S.O., ch. E.23 (1990).
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Q: What are the powers of Ontario notaries public?

A: Ontario notaries public generally have the power to draw, pass, keep and issue all deeds, contracts, charter-parties and other mercantile transactions in Ontario and to attest (*i.e.*, to affirm as true) all commercial instruments.⁷ The power to attest, unlike the other stated powers under section 3, is not expressly restricted to Ontario. Thus, this power appears generally to be exercisable anywhere. All these powers are subject to any imposed territorial and case restrictions.⁸

A notary public has the powers of a commissioner for taking affidavits in Ontario.⁹

Q: What are the powers of Ontario commissioners for taking affidavits?

A: Ontario commissioners have the power to take (*i.e.*, witness and sign) affidavits (concerning proceedings to be had in any Ontario court or before a judge of any Ontario court) and declarations (in cases where declarations may be taken or may be required under an Ontario Act).¹⁰

Q: What is the status of Ontario lawyers regarding these powers?

A: Upon application and payment of the prescribed fee to the appropriate government ministry, an Ontario lawyer can be appointed a notary public.¹¹ No further examination of his or her qualification for the office is required.¹² A lawyer who is a notary public is consequently a commissioner for taking affidavits in Ontario.

A lawyer entitled to practice law in Ontario, however, is automatically a commissioner for taking affidavits and oaths under the Commissioners for taking Affidavits Act.¹³ He or she is a commissioner regardless of whether he or she also becomes a notary public.

The commission of an Ontario barrister and solicitor, whether as a notary public or a commissioner for taking affidavits, is generally unrestricted regarding duration, territory and purpose.¹⁴

7. See Notaries Act, *supra* note 4, § 3.

8. See *id.* § 2(2).

9. See *id.* § 4(1).

10. See Commissioners for taking Affidavits Act, *supra* note 5, §§ 6, 7.

11. See Notaries Act, *supra* note 4, § 8(a).

12. See *id.* § 2(1).

13. See Commissioners for taking Affidavits Act, *supra* note 5, § 1(1)(3).

14. See Notaries Act, *supra* note 4, § 2(2); see also Commissioners for taking Affidavits Act, *supra* note 5, §§ 1, 3-5 (by implication).

Q: What may Ontario notaries public and commissioners, in these capacities, do *outside* Ontario?

- A: Outside Ontario, Ontario notaries public and commissioners may:
- attest commercial instruments¹⁵; and
 - take oaths, affidavits, affirmations and statutory declarations,¹⁶ to be used in an Ontario court, subject to any limitations or restrictions otherwise affecting the commission.

Q. What may Ontario lawyers, in their notarizing and commissioning capacities, do outside Ontario?

- A: Ontario lawyers therefore have the above powers outside Ontario. Thus, they may:
- attest commercial instruments;¹⁷ and
 - take oaths, affidavits, affirmations and statutory declarations,¹⁸ to be used in an Ontario court, subject to any limitations or restrictions otherwise affecting the commission.

Further, their commission powers are generally unrestricted.

15. See Notaries Act, *supra* note 4, § 3.

16. See Evidence Act, *supra* note 6, § 45(2).

17. See Notaries Act, *supra* note 4, § 3.

18. See Evidence Act, *supra* note 6, § 45(2).
